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FILED
AUG 13 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965
No. 281

MARGUERITE SHAKESPEARE and GENE SHAKESPEARE,
Appellants,

vs.

CITY OF PASADENA, a municipal corporation,
Appellee.

On Appeal From the California District Court of Appeal, Second Appellate District, Division Four.

MOTION TO DISMISS OR AFFIRM.

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CITY OF PASADENA, a municipal corporation,
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On Appeal From the California District Court of Appeal, Second Appellate District, Division Four.

MOTION TO DISMISS OR AFFIRM.

Appellee in the above-entitled case moves to dismiss this appeal or affirm the decisions of the District Court of Appeal of the State of California on the following grounds:

1. The federal questions sought to be reviewed were not timely or properly raised before the California Courts and were not expressly passed on; and

2. The federal questions sought to be reviewed are not substantial and there is no need for argument thereon.

Opinions Below.

The opinions of the California District Court of Appeal are reported as "Gene Shakespeare vs. City of Pasadena, et al.," 230 A.C.A. 416, and "Marguerite Shakespeare vs. City of Pasadena, et al.," 230 A.C.A. 430. Said opinions are also attached as appendices to the jurisdictional statement filed by appellants herein. Appellants' petitions for hearing in the Supreme Court of California were denied.

Jurisdiction.

There is a defect of jurisdiction over the subject matter of the questions sought to be raised by appellants on this appeal in that they failed in the California trial court and in their opening and reply briefs on appeal to draw into question the validity of any California statute under the constitution, treaties, or laws of the United States as required by 28 U.S.C. §1257(2) and failed to claim any right, privilege, or immunity under the constitution, treaties, or statutes of the United States as required by 28 U.S.C. §1257(3). Appellants did not contend that a federal question existed with respect to their claims until they filed their petitions for rehearing before the District Court of Appeal and their petitions for hearing before the California Supreme Court, all of which petitions were denied without comment.

The questions here presented by appellants, even if they had merit, were therefore waived and not considered by the California courts. As a result, it is submitted that jurisdiction is lacking herein. (*El Paso and Southwestern R.R. Co. v. Eickel and Weikel,* 226 U.S. 590, 598; *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291, 309; *Bailey v. Anderson,* 326 U.S. 203, 206; *New York Ex rel. Rosevale Realty Co. v. Kleinert,* 268 U.S. 646, 650.)

In addition, the questions sought to be presented are completely lacking in substantiality since it is well estab-

lished that a sovereign is immune from suit resulting from its governmental functions, except as it grants permission for such suits. (*Kawananakoa v. Polybland*, 205 U.S. 349, 353.)

Questions Presented.

1. Whether appellants properly raised and preserved the federal questions advanced.

2. Whether a substantial federal question exists.

Statement of the Case.

On May 4, 1962, appellants, a mother and her adult son, were arrested in the City of Pasadena while on the property of one Simon Zervos without his authority. [Eng. Stmt., Case #28262, p. 71, line 26.] Said arrest was made on the complaint of Mr. Zervos and followed his citizen's arrest of appellants. (Op. Br. Case #28262, p. 3, lines 22-25.) Within two hours of the arrest, Mr. Zervos filed with the Pasadena Police Department the accusation set forth as Appendix C to appellants' jurisdictional statement. On May 7, 1962, Mr. Zervos signed a complaint charging appellants with violations of California Penal Code, §601(j) (trespassing). [Eng. Stmt., Case #28262, p. 78, line 26, to p. 79, line 1.] Appellants were ultimately acquitted of the charges.

On August 6, 1962, appellant Marguerite Shakespeare filed a claim for damages in the amount of $90,000.00 with the City of Pasadena. On September 6, 1962 appellant Gene Shakespeare filed a claim with said City in the amount of $325,750.00. On May 3, 1963 appellants filed separate suits against appellee and co-defendants Pasadena Police Department, Pasadena City Prosecutor, Pasadena Deputy City Prosecutor, Pasadena Municipal Court, Pasadena Municipal Court Judges Hassler,

Fletcher and Butler, Pacific Indemnity Company (insurance carrier for City of Pasadena), and Police Officers Herring, Horine, Harrall, Olsen, Faulstich and Garrett.

Appellee's demurrers to appellants' original and first amended complaints were sustained with leave to amend. Appellee's demurrers to appellants' second amended complaint were sustained without leave to amend on the grounds that appellants had failed to state causes of action against appellee on the theories of false imprisonment, false arrest, malicious prosecution or conspiracy to commit malicious prosecution. An additional ground for sustaining the demurrer as to appellant Gene Shakespeare was that he had failed to comply with the applicable provisions of the Pasadena City Charter regulating the filing of claims against the City.

On appeal to the California District Court of Appeal, the judgment of the trial court was affirmed as to appellant Marguerite Shakespeare and reversed with directions as to appellant Gene Shakespeare. The reversal was on the limited ground that said appellant should be given leave to attempt to state a cause of action for false imprisonment on the theory that the jailer intentionally failed to release him after being advised that sufficient bail had been posted for said appellant. The District Court of Appeal affirmed the judgment of the trial court as to the balance of said appellant's claims and causes of action.

At no time in the trial court or in their opening and reply briefs on appeal did appellants raise any federal question. The decisions of the California courts were not based upon and did not pass upon any federal question.

ARGUMENT.

A. Appellants failed seasonably to raise and preserve Any of the Federal Questions Asserted in Their Jurisdictional Statement.

It is well settled under California practice that a point raised for the first time on appeal will not be considered by the Appellate Courts. (*Peebler v. Danziger,* 104 Cal. App. 2d 491, 493, 231 P. 2d 895; *Grimes v. Nicholson,* 71 Cal. App. 2d 538, 543, 162 P. 2d 934; *Douglas v. Southern Pacific Company,* 203 Cal. 390, 397, 264 Pac. 237.)

It is also well settled under California practice that an appeal may not be argued piecemeal by raising new questions for the first time on petitions for rehearing. (*Bradley v. Bradley,* 94 Cal. App. 2d 310, 312, 211 P. 2d 638; *Rolley, Inc. v. Merle Norman Cosmetics,* 129 Cal. App. 2d 844, 852, 282 P. 2d 991; *Pasadena Ice Co. v. Reeder,* 206 Cal. 697, 705, 275 Pac. 944.) The rule is stated in 3 Cal. Jur. 2d, Appeal and Error, §140, as follows:

> "It is a general rule of Appellate review, early established and long adherred to, that questions not raised in the trial court will not be considered on appeal."

Although it is difficult to determine appellants' actual contentions from their jurisdictional statement, it would appear that they are now contending that §847 of the California Penal Code and §§820.4 and 821.6 of the California Government Code are repugnant to the Fourth, Fifth, Sixth, Seventh and Fourteenth Amendments and to 42 U.S.C. §§1981-6. Although their jurisdictional statement becomes more vague in this respect, appellants are also apparently alleging that they have

been deprived of rights under the Fourth, Fifth, Seventh and Fourteenth Amendments. Since none of these contentions were contained in appellants' opening or closing briefs below, it is submitted that under the above authorities, appellants have waived and abandoned said issues.

The failure to raise the federal questions set forth in appellants' jurisdictional statement in the trial court is fatal to jurisdiction in view of California practice. (*Bailey v. Anderson,* 326 U.S. 203, 206; *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291, 308.)

Similarly, the failure to timely raise any federal question before the California Appellate Courts creates a fatal jurisdictional defect. (*Hulbert v. Chicago,* 202 U.S. 275, 280; *C.I.O. v. McAdory,* 325 U.S. 472, 477; El *Paso & Southwestern R.R. Co. v. Eickel and Weikel,* 226 U.S. 590, 598; *Beck v. Washington,* 369 U.S. 541, 549.)

In *Herndon v. Georgia,* 195 U.S. 441, 442, the court held that a federal question must be specifically raised, and that it is not sufficient to merely rely generally on the Constitution, the Fourteenth Amendment or the Laws of the United States. The court also stated at page 443, as follows:

> "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

In view of the foregoing authorities, it is respectfully submitted that there is no basis for the exercise of jurisdiction by this Court upon the record herein.

B. The Questions Raised by Appellants Are Totally Lacking in Substantiality.

It is difficult to determine from appellants' jurisdictional statement the actual questions intended to be presented by their appeal. However, it would appear that the substance of their contentions is that the California District Court of Appeal erred in holding that appellee, City of Pasadena, was immune from the claims of appellants under the facts alleged in their several complaints in that the rules of governmental immunity applied by the California courts are unconstitutional.

The theory of governmental immunity has been held by this Court to be an established principle under our legal system. In *Kawananakoa v. Polybland,* 205 U.S. 349, the rule is stated as follows at page 353:

> "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

See, also: *Rhyne, Municipal Law* (1957), 780; 18 *McQuillan, Municipal Corporations* (3rd Ed.), §53.24, pp. 169-177.

California has a most liberal Public Liability Act which waives the immunity of municipalities in many situations. However, as stated by the District Court of Appeal in its decisions below, certain immunities remain and these immunities were found applicable to the facts of appellants' cases. Since sovereign immunity will vary from state to state and each state may waive or retain such immunities as it chooses, appellants' contentions raise only narrow questions limited to the particular facts of appellants' cases. It is therefore submitted that

the questions raised by appellants have no general application, are not substantial, and do not warrant review by this Court.

Conclusion.

1. Appellants have clearly failed to properly raise and preserve in the California courts the questions advanced in their jurisdictional statement, thereby creating a fatal jurisdictional defect.

2. The questions raised by appellants in their jurisdictional statement are vague, indefinite, and unspecific. Said questions are completely lacking in substantiality since they involve only the particular facts of this case as related to the governmental liability laws of the State of California. Since this Court has held that governmental immunity is an established and accepted rule under our legal system, the California District Court of Appeal was correct in applying said rule to the facts of appellants' cases.

In view of the foregoing, it is respectfully submitted that appellee's motion to affirm or dismiss should be granted.

Respectfully submitted,

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